No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 10

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the firm and/or fictitious name of Yancey Insulation Co.,
Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF FOR APPELLANTS.

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STATEMENT CONCERNING JURISDICTION.

The complaint of Appellants herein, filed August 19, 1943, in the United States District Court for the District of Nevada, discloses that the amount in controversy, exclusive of interest and costs, exceeds $3000.00 (Complaint, par. V, Tr. p. 10); said complaint discloses diversity of citizenship, wherein it alleges that Appellants are citizens and residents of, and domiciled in, the State of Nevada (Complaint, par. I, Tr. p. 2), and that Appellee is a citizen and resident of, and domiciled in, the State of California (Complaint, par. II, p. 2).

Appellee's motion to dismiss admits diversity of citizenship and the amount in controversy, the motion to dismiss under present practice being equivalent to the old demurrer. All facts set up in the complaint must be taken as true on the motion to dismiss.

Jurisdiction of the District Court is based on Title 28, U. S. C. A., Sec. 41, which provides:

> "The District Courts shall have original juristion as follows:
>
> (1) ". . . Or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and . . .
>
> (b) is between citizens of different states . . ."

The District Court entered judgment on January 14, 1944, dismissing Appellants' action (Tr. p. 25).

The Appellants, within three months from the entry of said judgment, and on April 14, 1944, filed notice of appeal to the Circuit Court of Appeals (Tr. p. 26).

Thereafter the record on appeal was filed and docketed (Tr. p. 36).

The case comes before this Honorable Court on appeal from the judgment of the District Court dismissing Appellants' action.

Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based on Title 28, U. S. C. A., Sec. 225, which provides:

> "The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions:

"First, in the District Courts, in all cases save where a direct review may be had in the Supreme Court under Section 345 of this Title."

STATEMENT OF THE CASE.

This appeal is from the judgment of the District Court dismissing Appellants' action and in favor of Appellee.

Appellants are for convenience hereafter referred to as follows: George C. King as "Husband" and Jessie F. King as "Wife". Appellee, for convenience, is hereafter referred to as "Yancey".

The Court's judgment reads:

"It is the conclusion of the Court that the motion to dismiss should be sustained.

"It is so ordered." (Tr. p. 25.)

Following the order of dismissal a notation in the docket of the case was entered by the Clerk of the District Court, reading as follows:

"Judgment of Dismissal entered this day." (Tr. p. 26.)

The facts out of which this action arose are:

Jessie F. King and George C. King are wife and husband, and, as above stated, will be hereafter referred to as Wife and Husband.

J. H. Yancey does business under the firm or fictitious name of Yancey Insulation Co., having a place of business located in the City of Reno, Nevada. At that place Yancey carries on a general business of

the insulation of building structures and some related lines of business.

The Husband was regularly employed by Yancey to solicit business for him, and particularly the business of insulating business structures of all kinds and descriptions. In the regular course of the Husband's employment, he worked out of the business house or place where Yancey's business was conducted in the City of Reno, reporting there, and using the building where Yancey's business was conducted at all times when not actually in the field soliciting contracts.

In the regular course of the Husband's employment he had a key to the main entrance of Yancey's business building, and entered said building at all times and at all hours and on all days, for the purpose of facilitating and carrying on his employment under the terms thereof.

On Sunday, July 19, 1942, the Husband, in the regular course of his employment, made preparations to call upon a prospective customer of Yancey's for an insulation job at Bridgeport, California, which call he expected to make on the following day.

The Husband, being an elderly man and in very poor health and subject to falling asleep without warning, requested the Wife to accompany him on his contemplated trip by automobile from Reno, Nevada, to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on his trip, and particularly, of course, and a

proper inference from the allegations of the complaint, for his protection in the performance of his duties for Yancey should he be affected by falling asleep, as he might possibly do at any time on an automobile trip of such distance.

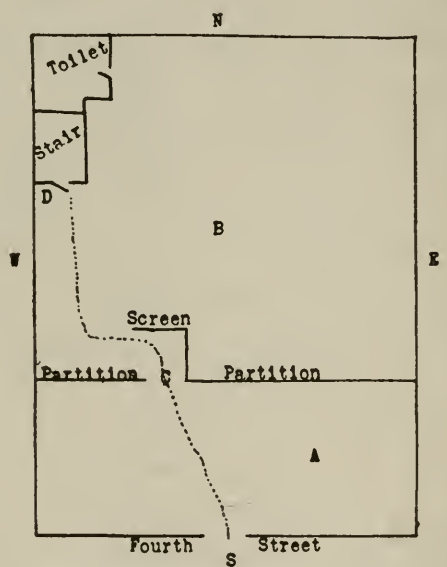
The Wife consented to, and agreed to, accompany the Husband, for these reasons and purposes just described, and in pursuance of said agreement and arrangement and plan, went with the Husband in his automobile on the morning of Sunday, July 19, 1942, to Yancey's place of business, in order that in pursuance of the carrying out by the Husband of the requirements of his employment by Yancey, the Husband could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of Yancey at Bridgeport. The Husband stopped his automobile at the main entrance of Yancey's business place, entered the building, and the Wife remained in the car. But a short time later the Husband came out of the building to the car and stated to the Wife that the trip to the first point of stoppage en route to Bridgeport, California, would be a long trip; that the Husband was planning to go by way of Lake Tahoe; that facilities where the Wife could perform the exigencies of nature would not be easily available for a long period of time; and suggested that the Wife come in the building and use the toilet before starting on the journey.

At first the Wife indicated that it was not at that time necessary, and the Husband returned into the business building of Yancey. But within a few mo-

ments the Wife left the automobile and herself went into Yancey's building and stated to the Husband that she had decided that it would be necessary and advisable to use the toilet facilities in Yancey's building before starting on the journey.

Without repeating the specific allegations of the complaint as to the nature of the building, it is believed that a far better understanding of the locale can be obtained by the Court from the following drawing, which in pictorial form sets up the physical facts of Yancey's building and place of business.

The drawing follows:



Upon the Wife stating that she desired to use the toilet, as she had been requested to do by the Husband, the Husband, who, at that time, with the Wife, was in the front office section of the building and between the street and the partition (area A in draw-

ing), turned toward the open place in the partition (area C), and, pointing in that direction, said: "You will find the toilet in there. The door is partly open".

Thereupon, the Wife went through the opening in the partition, turned to the left to avoid the screen, and then turned to the right. Almost directly before her, at a distance of approximately 20 feet, more or less, appeared a door partly open, hanging in a wall which came out of the main west wall some two feet wider than the door, and then ran northerly to the north wall of the main structure. A reference to the drawing will indicate clearly that obviously said door (indicated by letter "D") was the only door which could be seen by a person entering said rear portion (area B) of Yancey's business building as the Wife, by the physical structure, was required to enter said rear portion (area B) of said building.

The partition running east and west through the business building of Yancey was a high partition, rising to within a few feet of the ceiling, and the screen north of the opening in this partition was a high screen but not quite as high as the partition itself. Yancey had been using the rear room for showing moving pictures of insulation jobs, and the only two windows in the rear portion of said building (area B) were covered with a black paper which shut out all light from entering the back room (area B). The available light in the back room was that which came from the street side of the building, which was almost all glass, there being two large windows on each side of the door, and the door having a glass panel, and

which found its way into the room over the top of the partition.

Although the light was poor, the Wife could see the open door (D) reasonably clearly. She could see that the door was hung on the west side and opened out toward the south. Thereupon the Wife approached that door, took the knob or handle of the door in her left hand, opened the door with her left hand, and as she did so the light from the street windows, coming over the partition, lighted the top portion of the structure into which the door entered. The Wife saw the walls, and relying upon the directions which had been given to her by the Husband, stepped forward into the small structure, believing it to be the toilet. As the Wife stepped forward, her foot did not contact a floor, as anticipated, but the entrance was to a steep flight of stairs, and the sudden stepping down the first step, which was almost immediately behind the door, threw the Wife off balance, and she was catapulted down a long flight of stairs to the cellar of Yancey's building.

There was no warning sign on the door of any character, or any sign at all; there was no rail, chain or other protective device of any kind or character to prevent a person from falling down this stairway, and no platform of any kind, character or description was provided by Yancey either to warn a person of the dangerous character of the stairway, dropping as it did almost immediately from behind the door. There was no light or other device of any kind or character to show the presence of the dangerous

conditions, as above described. Yancey had been put on notice before Sunday, July 19, 1942, by other persons almost falling down this stairway. This stairway, in the condition in which it existed, was dangerous and a menace to persons rightly in said building and using the facilities thereof.

After the Wife entered the rear portion of Yancey's building (area B) it was impossible for her to see that there existed a door entering what was actually the toilet, said toilet being located in the area above the stairway down which the Wife fell, and said toilet being entered by a door on the side wall of the structure in which the stairway was located, which door opened inwardly, toward the west, and therefore could not possibly protrude or be visible to the Wife.

Yancey was negligent and careless in the following manner:

1. In maintaining a dangerous stairway, as heretofore described.

2. In failing to have, keep and maintain any guard rail or other means to prevent a person from falling down said stairs.

3. In failing to maintain a light in said stairway area so that one entering the doorway thereto could see the dangerous and open stairway.

4. In failing to maintain or otherwise to indicate the danger of said stairway.

5. In failing to maintain any sign or other warning to indicate that said door lead to a stairway.

6. In failing to warn the Wife of the existence of said dangerous stairway.

7. In failing to properly instruct the Wife as to the location of the toilet in said premises, and in permitting her, because of the failure of proper instructions, to enter the door to the stairway instead of entering the door to the toilet, which latter door could not be seen by the Wife in entering the rear portion of Yancey's building (area B).

8. In failing to keep said premises of Yancey in a reasonably safe condition so that those invited to enter therein would not be unnecessarily exposed to danger.

9. For maintaining a dangerous stairway without a platform of reasonable width before the first and top step of said stairway.

10. In failing to exercise due and reasonable care for the safety of the Wife, after she was invited to enter the premises of Yancey.

Solely by reason of, and as a direct and proximate result of, the negligence and carelessness of Yancey, the Wife was severely injured, suffering terrible injuries which are more particularly described in paragraph V of the complaint of Appellants filed in the District Court (Tr. pp. 10-11).

The complaint filed in the District Court prays damages in the sum of $20,000.00 against Yancey, together with costs of suit.

Under the circumstances as they have been above outlined, it would seem that there cannot be the

slightest question that the instructions given to the Wife by the Husband were wantonly negligent. They can only be explained by the Husband's poor health and lack of foresight in directing one who was not as familiar with the premises as he was.

In the opinion and decision of the District Judge we find the following:

> "It is clear from the map that a stranger to the floor space of the building, upon inquiring from one in the main office, of the location of the toilet and that such person turning 'toward the open place in the partition, and pointing in that direction said, "You will find the toilet in there. The door is partly open" ', and thereupon such stranger entering the larger room space to the north of the partition, might probably become confused upon such entrance when but one door space would appear in view, no mention having been made of the presence of two doors or the precise or approximate location of the toilet door.
>
> "Conceding such statement to constitute negligence which occasioned the accident and injury, the Plaintiff husband's employment by defendant was not of the character which would make the defendant, in law, liable for such negligence and, hence, subject to a judgment for damages therefor in favor of both husband and wife upon a community property law relationship or in favor of either of them." (Tr. p. 25.)

THE QUESTIONS INVOLVED ON THIS APPEAL AND THE MANNER IN WHICH THEY ARE RAISED ARE AS FOLLOWS:

Appellants' legal position is as follows:

1. Assuming for the moment that the Husband was acting within the scope of his authority, the Wife was not only an invitee but an express invitee, and Yancey would be clearly liable.

2. The Wife under the law of master and servant, taking into consideration the facts that the Husband was a salesman, had a right to use Yancey's premises at all times, had a key thereto, was actually there to prepare his materials for a trip on behalf of the master, and was being aided in prosecuting that trip by the Wife, was entitled to rely upon the authority of the Husband to invite her into the premises for the purpose for which she entered, and Yancey is liable.

3. Even if the Husband was acting outside the scope of his actual authority, the Wife, at the time of her injuries, was engaged in something for the benefit of Yancey, or which his employee, the Husband, believed was for the benefit of Yancey, and under such circumstances the Wife became an invitee by implication, and Yancey is liable.

4. Even if the Wife was a mere licensee, her presence in the premises was known to the Husband, he having expressly invited her to enter for a particular purpose, and the master and his servants, using the premises, were under obligation to thereafter exercise

reasonable care, but the conduct of the Husband was wantonly negligent, and Yancey is liable.

5. Even if the Wife were considered in the worst possible status, to-wit, as a trespasser, which she certainly was not, the master, Yancey, would be liable for the wanton negligence of his servant perpetrated upon her, and would be liable.

Yancey's legal position is as follows:

1. That the Wife was a mere licensee on Yancey's premises, to whom Yancey owed no duty whatever.

2. That the Husband was acting entirely outside the scope of his employment.

The manner in which these contrary legal positions are presented is by the complaint of Appellants filed in the District Court, and by a motion to dismiss by Appellee in that Court, upon the ground that the complaint of Appellants fails to state a claim against Appellee upon which relief can be granted.

(For the respective legal positions of the Husband and Wife and of Yancey, see Appellants' complaint, Tr. pp. 2-12, and Appellee's motion to dismiss, Tr. pp. 15-16.)

SPECIFICATION OF ERRORS.

The errors in the District Court which Appellants rely upon are:

1. The Court erred in failing to follow the established principle of law in the Federal Courts that the

law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern.

2. The Court erred in refusing to leave to the determination of a jury the degree of negligence of the Appellee where gross negligence would make the Appellee liable under the Court's own opinion and decision.

3. The Court erred in holding that Appellant, Jessie F. King, was not an express invitee of Appellee, J. H. Yancey.

4. That the District Court erred for all of the reasons set forth in the "Statement of Points on which Appellants Intend to Rely on Appeal" set forth in the transcript, on pages 29-34, both inclusive, reference to which is hereby specifically made as if the same were herein set up *in haec verba,* it being deemed unnecessary to here repeat said points as specifications of error, as they could only unduly enlarge this brief, but each and every of said points is here stated as a specification of error.

SUMMARY OF THE ARGUMENT.

Except in matters covered by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the state, and whether the law of the state shall be declared by its Legislature in a

statute or by its highest Court in a decision is not a matter of Federal concern.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487;

Conformity Act, 28 U. S. C. A., Section 724;

American Steel and Wire Co. v. Sieraski, 119 Fed. (2d) 709.

In considering the granting or refusing of a motion to dismiss, the Court will take as proven every fact stated in the complaint and essential to recovery, and every inference of fact that can be legitimately drawn therefrom, the plaintiff being given the benefit of all presumptions.

Federal Life Insurance Co. v. Ettman, 120 Fed. (2d) 837, certiorari denied 314 U. S. 660, 86 L. Ed. 529, 62 S. Ct. 115;

Ekhardt and Becker Brewing Co., Inc. v. Kavanagh, 112 Fed. (2d) 751;

Leimer v. State Mutual Life Assurance Co. v. Worcester, Mass., 108 Fed. (2d) 302;

System Federation Number 59, etc. v. Louisiana and A. Ry. Co., 30 F. Supp. 909, certiorari denied 314 U. S. 656, 86 L. Ed. 526, 62 S. Ct. 108;

Shaw's, Inc. v. Wilson-Jones Co., 26 F. Supp. 713, aff'd 105 F. (2d) 331;

Niagara Motors Corp. v. McGowan, 45 F. Supp. 346;

Horlick's Malted Milk Corp. v. Horlick, 40 F. Supp. 501;

Munsey v. Virginian Ry. Co., 39 F. Supp. 881;
Tahir Erk v. Glenn L. Martin Co., 32 F. Supp. 722, rev'd 116 F. (2d) 865;
Securities & Exchange Commission v. Gilbert, 29 F. Supp. 654;
Vanadium-Alloys Steel Co. v. McKenna, 27 F. Supp. 535;
Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941;
Wilcox v. City of Pittsburgh, 121 F. (2d) 835;
Willner v. Hazen, 71 App. D. C. 373, 111 F. (2d) 511;
Kuhn v. Pacific Mutual Life Insurance Co. of California, 37 F. Supp. 102.

A motion to dismiss in accordance with Rule 12(b) is subject to the general requirements of Rule 7(b). A motion to dismiss for failure to state a claim must specify the various grounds and objections on which it is based. The scope of the attack is circumscribed by the grounds assigned.

Colpoys v. Gates, 118 F. (2d) 16.

The Supreme Court of Nevada, the highest appellate court in that state, has established that the duty owed by Yancey to the Wife, even if she is considered as a trespasser, was not to wantonly injure her or fail to exercise due care to prevent her injuries after her presence in a place of danger was discovered.

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839;
Babcock & Wilcox Co. v. Nolton, 71 Pac. (2d) 1051;

Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev. 1940) 633.

The Husband had the necessary authority to invite the Wife upon the premises of Yancey, and she was therefore an express invitee.

Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev. 1940) 633.

To the Wife, as an express invitee, Yancey owed the duty of ordinary care.

Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev. 1940) 633.

It is the general rule of law that not only to a mere licensee but even to a trespasser, Yancey owed the duty not only not to wantonly or willfully injure the Wife but also to use ordinary care to avoid injuring her after her presence was discovered.

Babcock & Wilcox Co. v. Nolton, 71 Pac. (2d) 1051;

Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev. 1940) 633;

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839;

Lambert v. Western Pac. R. Co. et al., 26 Pac. (2d) 824;

Fisher v. Burrell, 241 Pac. 40-45;

Gotch v. K. & B. Packing & Provision Co., 25 Pac. (2d) 719;

Hooker v. Routt Realty Co., 76 Pac. (2d) 431.

The affirmative acts of Yancey's employee, the Husband, constitute wanton negligence, which would make

Yancey liable for injuries not only to a licensee but even to a trespasser.

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839;

Conchin v. El Paso & S. W. R. Co., 108 Pac. 260.

The Wife was engaged in something for the benefit of Yancey when she entered the premises of Yancey, and even under such circumstances, without the express invitation of the Husband, she became an invitee by implication.

Smith v. Pickwick Stages System, 297 Pac. 940, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson;*

Buckingham v. San Joaquin Cotton Oil Co., 16 Pac. (2d) 807;

Childers v. Southern Pac. Co., 149 Pac. 307.

Yancey is bound by the act of the Husband as his agent, that act falling within the apparent scope of the authority of the agent. Yancey will not be permitted to deny such authority against the Wife, an innocent third party who dealt with the agent in good faith.

Smith v. Pickwick Stages System, 297 Pac. 940, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson;*

Skerl v. Willow Creek Coal Co., 69 Pac. (2d) 502;

Harrison v. Auto Securities Co., 257 Pac. 677;
Healy v. Johnson, 103 N. W. 92;
Ada-Konawa Bridge Co. v. Cargo, 21 Pac. (2d) 1.

The doctrine of *respondeat superior* is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.

Healy v. Johnson, 103 N. W. 92;
Childers v. Southern Pac. Co., 149 Pac. 307.

Appellants are entitled to the presumption that exists that when the servant is engaged upon the performance of his master's business he is acting within the scope of his employment. The Supreme Court of Nevada has enunciated such rule.

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839.

The Nevada Supreme Court has determined as the law of Nevada that the Husband's contributory negligence cannot be imputed to the Wife so as to preclude recovery by the Wife from a third person, Yancey, notwithstanding statutes providing that all property acquired after marriage is community property.

Fredrickson & Watson Co. et al. v. Boyd et al., 102 Pac. (2d) 627.

ARGUMENT OF THE CASE AND THE LAW.

EXCEPT IN MATTERS COVERED BY THE FEDERAL CONSTITUTION, OR BY ACTS OF CONGRESS, THE LAW TO BE APPLIED IN ANY CASE IS THE LAW OF THE STATE, AND WHETHER THE LAW OF THE STATE SHALL BE DECLARED BY ITS LEGISLATURE IN A STATUTE OR BY ITS HIGHEST COURT IN A DECISION IS NOT A MATTER OF FEDERAL CONCERN.

Erie Railroad Co. v. Tompkins, 302 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487;

Conformity Act, 28 U. S. C. A., Section 724;

American Steel and Wire Co. v. Sieraski, 119 Fed. (2d) 709.

The rule announced by the Supreme Court in *Erie Railroad Co. v. Tompkins,* supra, remaining unchanged, is of course sufficient authority for the above principle.

IN CONSIDERING THE GRANTING OR REFUSING OF A MOTION TO DISMISS, THE COURT WILL TAKE AS PROVEN EVERY FACT STATED IN THE COMPLAINT AND ESSENTIAL TO RECOVERY, AND EVERY INFERENCE OF FACT THAT CAN BE LEGITIMATELY DRAWN THEREFROM, THE PLAINTIFF BEING GIVEN THE BENEFIT OF ALL PRESUMPTIONS.

It should be unnecessary to support this statement by more than the citation of the following authorities, the rule being so universally accepted, the motion to dismiss under Rule 12(b) having taken the place of the demurrer now abolished under the Rules.

Federal Life Insurance Co. v. Ettman, 120 Fed. (2d) 837, certiorari denied 314 U. S. 660, 86 L. Ed. 529, 62 S. Ct. 115;

Ekhardt and Becker Brewing Co., Inc. v. Kavanagh, 112 Fed. (2d) 751;

Leimer v. State Mutual Life Assurance Co. v. Worcester, Mass., 108 Fed. (2d) 302;

System Federation Number 59, etc. v. Louisiana and A. Ry. Co., 30 F. Supp. 909, certiorari denied 314 U. S. 656, 86 L. Ed. 526, 62 S. Ct. 108;

Shaw's, Inc. v. Wilson-Jones Co., 26 F. Supp. 713, aff'd 105 F. (2d) 331;

Niagara Motors Corp. v. McGowan, 45 F. Supp. 346;

Horlick's Malted Milk Corp. v. Horlick, 40 F. Supp. 501;

Munsey v. Virginian Ry. Co., 39 F. Supp. 881;

Tahir Erk v. Glenn L. Martin Co., 32 F. Supp. 722, rev'd 116 F. (2d) 865;

Securities & Exchange Commission v. Gilbert, 29 F. Supp. 654;

Vanadium-Alloys Steel Co. v. McKenna, 27 F. Supp. 535;

Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941;

Wilcox v. City of Pittsburgh, 121 F. (2d) 835;

Willner v. Hazen, 71 App. D. C. 373, 111 F. (2d) 511;

Kuhn v. Pacific Mutual Life Insurance Co. of California, 37 F. Supp. 102.

A MOTION TO DISMISS IN ACCORDANCE WITH RULE 12(b) IS SUBJECT TO THE GENERAL REQUIREMENTS OF RULE 7(b). A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM MUST SPECIFY THE VARIOUS GROUNDS AND OBJECTIONS ON WHICH IT IS BASED. THE SCOPE OF THE ATTACK IS CIRCUMSCRIBED BY THE GROUNDS ASSIGNED.

In the instant case, the Appellee specified no grounds or objections whatever upon which the motion to dismiss was based, the scope of the attack being circumscribed by the grounds assigned, and none having been assigned, the attack fails.

Colpoys v. Gates, 118 F. (2d) 16.

THE SUPREME COURT OF NEVADA, THE HIGHEST APPELLATE COURT IN THAT STATE, HAS ESTABLISHED THAT THE DUTY OWED BY YANCEY TO THE WIFE, EVEN IF SHE IS CONSIDERED AS A TRESPASSER, WAS NOT TO WANTONLY INJURE HER OR FAIL TO EXERCISE DUE CARE TO PREVENT HER INJURIES AFTER HER PRESENCE IN A PLACE OF DANGER WAS DISCOVERED.

This principle was enunciated in the Supreme Court of Nevada in the case of *Crosman v. Southern Pac. Co.,* 194 Pac. (Nev. 1921) 839, which still remains the law in the State of Nevada, there being no decision by the Supreme Court, the Court of highest appellate jurisdiction to the contrary.

In that case, the Court, through Mr. Justice Ducker, said:

> ". . . But, as the duty the respondent owed him as a licensee, under the facts of this case, was no greater than a trespasser—that is, not to wantonly or willfully injure him or fail to exercise due care to prevent his injuries after his presence

> in a place of danger was discovered—the difference in the evidence in this respect cannot make the decision of the court on the former appeal less controlling as to the question of proximate cause."

It is interesting to note that in *Nevada Transfer & Warehouse Co. v. Peterson,* 99 Pac. (2d) (Nev. 1940) 633, twenty years later, counsel for the defendant conceded this to be the rule in Nevada, the Court, through Mr. Justice Ducker in that case referring to this concession in the following language:

> ". . . This contention is grounded in part on the theory that Mrs. Peterson was on the premises as a trespasser, or bare licensee, to whom appellant owed no duty, except to refrain from wilfully or wantonly injuring her."

The same rule was announced somewhat earlier in the case of *Babcock & Wilcox Co. v. Nolton,* 71 Pac. (2d) 1051, in which the Court said:

> "As the jury was entitled to conclude from the evidence that respondent Mrs. Nolton had the status of a licensee on the premises, the duty imposed on appellant was, as stated in the instructions, to refrain from willfully or wantonly injuring her, or to use care to avoid injuring her after her presence was, or under the circumstances should have been, discovered."

The Court proceeds:

> ". . . The great weight of authority is to the effect that a person guilty of active negligence, as distinguished from passive negligence, is liable for resulting injury to a licensee."

Further:

> ". . . 'If the owner, while the licensee is upon the premises in the exercise of due care, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased hazard and danger, the owner will be liable for injuries sustained as the result of such active and affirmative negligence.' "

THE HUSBAND HAD THE NECESSARY AUTHORITY TO INVITE THE WIFE UPON THE PREMISES OF YANCEY, AND SHE WAS THEREFORE AN EXPRESS INVITEE.

The Supreme Court of the State of Nevada, the highest Court of appellate jurisdiction, in the case of *Nevada Transfer & Warehouse Co. v. Peterson, et al.,* 99 Pac. (2d) 633, had occasion to consider a case involving facts practically on all fours with the facts of the case at bar.

In that case the plaintiff, after bringing a flashlight to plaintiff's husband, who was defendant's foreman at defendant's warehouse, was requested by defendant's night watchman, who was in charge of the warehouse, to go to warehouse office to attend to a duty for the watchman, which the watchman was unable to perform because of being engaged in other duties.

The Court in that case held the plaintiff was an invitee on the premises with respect to defendant's liability for injury received by plaintiff while departing from the office. The Court held that a night watchman in charge of defendant's warehouse had implied

authority to request plaintiff to go to the warehouse office while a stranger was using a telephone in the office, where the watchman could not remain in the office because of being engaged in performing other duties, and that an invitation is implied where the entry on, or use of, the premises is for a use which is, *or is supposed to be,* beneficial to the owner or occupant.

The Court further held that where the plaintiff as such invitee was requested by the night watchman to go through a darkened receiving room leaving the office, and the watchman knew of an open pit in the receiving room, the watchman was negligent in directing plaintiff to go through receiving room without warning of the pit, even if watchman told plaintiff to be careful, and that the watchman's negligence was the "proximate cause" of injuries received when plaintiff fell into the pit.

The Court further held that the night watchman of the defendant had implied authority to request the plaintiff to leave, as she attempted to do, and that the defendant could not escape liability for the injuries to the plaintiff when she fell in the pit on the theory that the watchman was not acting within the scope of his employment in advising plaintiff as to the way out of the office.

The Court approved a charge of the Court, in that case, reading as follows:

> "The Court instructs the jury that if you believe from the evidence in this case that an agent

and employee of the Defendant corporation, while acting within the scope of his employment, invited and requested the plaintiff, Amy J. Peterson, to come upon the premises of the Defendant corporation, and if you further believe from the evidence that the dangerous condition of the premises was unknown to the Plaintiff, Amy J. Peterson, that it was then the duty of the Defendant corporation or its agent and employee to warn the Plaintiff, Amy J. Peterson, of the dangerous condition of the premises, of which condition the Defendant corporation is charged with knowledge, and a failure to so notify the Plaintiff, Amy J. Peterson, of the dangerous condition of the premises would constitute negligence on the part of the Defendant corporation."

The Court approved a second instruction reading as follows:

"The Court instructs the jury that if you believe from the evidence that one of the agents and employees of the Defendant corporation directed the plaintiff, Amy J. Peterson, as to the passageway through which she should leave the premises, that said Plaintiff had the right to assume that the said passageway would be in a reasonably safe condition."

The Court further approved the following instruction:

"The Court instructs the jury that it was the duty of the Defendant corporation to provide reasonably safe passages to and from the places included in its invitation to use the premises; and if you believe from the evidence that the Plain-

tiff, Amy J. Peterson, was invited and requested to use a passageway which was in a dangerous condition, and that the Plaintiff, Amy J. Peterson, did not know of the location of said loading pit, then the invitation and request to Plaintiff, Amy J. Peterson, to use said passageway constituted negligence on the part of the Defendant corporation."

Further in its opinion the Court said:

"One in charge of premises has authority to do thereon any reasonable act to accomplish the discharge of his duties . . . An additional reason for holding that Ginnochio (the night watchman) had implied authority to invite her to the office may be found in the fact that her going there was for the benefit of appellant. Smith v. Pickwick Stages System, 113 Cal. App. 118, 297 P. 940. 'An invitation is implied where the entry on, or the use of, the premises is for a purpose which is, *or is supposed to be,* beneficial to the owner or occupant.' " (Italics supplied.)

In that case the Nevada Supreme Court cites with approval the case of *Smith v. Pickwick Stages System,* 113 Cal. App. 118, 297 Pac. 940. Referring to that case we find that a mere driver of a stage belonging to the Pickwick Stages System invited the plaintiff into a loading room and stage, the Court saying:

"The uncontradicted evidence shows that plaintiff was in the 'loading room' and also in the stage at the express invitation of the driver, who had charge of the driving and unloading of the stage, and there is no contention by appellant that

> the driver lacked authority from it to grant plaintiff the privilege of entering the 'loading room' and stage. The driver's authority will, therefore, be presumed. Plantiff's legal status was, therefore, that of an invitee in the 'loading room' of appellant at the time of her injury, and, as such, she was entitled to ordinary care at the hands of the servant of appellant, and an omission in this particular would be binding upon the master for at the time of the infliction of the injury the servant was engaged in accomplishing an object in the line of duties assigned to him by such master. (Citing several cases and texts.)"

So, in the instant case, where the Husband was in charge of Yancey's premises, was there in the course of his employment to prepare his materials for a contemplated trip to call upon a prospective customer, had a key to the office, and regularly used the office for such purpose, he certainly had the same implied authority, if it were necessary to imply it, to invite a person upon the premises, as he did the Wife. But more particularly, inasmuch as the Wife was accompanying him for the benefit of Yancey's business, to make it possible for the Husband to take the long trip contemplated, which it would have been dangerous for him to take in view of his age and physical infirmities, the Wife was not only expressly invited but directed by the Husband to enter Yancey's premises, and for a purpose which the Husband believed would further facilitate the master's (Yancey's) business.

TO THE WIFE, AS AN EXPRESS INVITEE, YANCEY OWED THE DUTY OF ORDINARY CARE.

Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev. 1940) 633.

It must of course be admitted that if we assume that the Wife was an express invitee, as Appellants believe she was, Yancey owed her the duty of ordinary care. The Honorable Judge of the District Court, in his own decision, admitted that the conduct of the Husband was negligence, that there was a lack of ordinary care, and under such circumstances it is evident that the action should not have been dismissed.

IT IS THE GENERAL RULE OF LAW THAT NOT ONLY TO A MERE LICENSEE BUT EVEN TO A TRESPASSER, YANCEY OWED THE DUTY NOT ONLY NOT TO WANTONLY OR WILLFULLY INJURE THE WIFE BUT ALSO TO USE ORDINARY CARE TO AVOID INJURING HER AFTER HER PRESENCE WAS DISCOVERED.

Babcock & Wilcox Co. v. Nolton (Nev.), supra;
Nevada Transfer & Warehouse Co. v. Peterson (Nev.), supra;
Crosman v. Southern Pac. Co. (Nev.), supra;
Lambert v. Western Pac. R. Co. et al., 26 Pac. (2d) 824;
Fisher v. Burrell, 241 Pac. 40-45;
Gotch v. K. & B. Packing & Provision Co., 25 Pac. (2d) 719;
Hooker v. Routt Realty Co., 76 Pac. (2d) 431.

THE AFFIRMATIVE ACTS OF YANCEY'S EMPLOYEE, THE HUSBAND, CONSTITUTE WANTON NEGLIGENCE, WHICH WOULD MAKE YANCEY LIABLE FOR INJURIES NOT ONLY TO A LICENSEE BUT EVEN TO A TRESPASSER.

Crosman v. Southern Pac. Co. (Nev.), supra;
Conchin v. El Paso & S. W. R. Co., 108 Pac. 260.

Unfortunate as it may be that the Husband should have directed the Wife to the toilet as he did, in such a manner that from the physical aspects as shown by the drawing in the statement of facts, she could only as a reasonable person enter the entrance to the dangerous stairway, and when we take into consideration the lighting conditions, with the light coming over the partition and lighting up the upper portion of the stairway entrance so that it looked exactly like the toilet, and there being no chain, warning sign or other means of apprising one of the existence of the stairway, and the stairs dropping precipitously from the door jamb, it is perfectly clear, even as a matter of law, and certainly a question for a jury to determine, that Yancey's employee, acting within the scope of his authority, was not only guilty of ordinary negligence but of wanton negligence.

As was said in the case of *Conchin v. El Paso & S. W. R. Co.,* 108 Pac. 260:

> "To constitute 'wantonness' it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely

> and not improbable result of the wrongful act. The word 'likely' is here used in the sense of something more than possible and less than probable. 'Wantonly. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice.' 2 Bouvier, 1207."

The Supreme Court of Nevada, in defining wanton negligence, in *Crosman v. Southern Pac. Co.,* supra, said:

> ". . . while to constitute 'wanton negligence' the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious from his knowledge of surrounding circumstances and existing conditions that his conduct will naturally or probably result in injury."

Under the circumstances, therefore, the complaint alleges facts which constitute wanton negligence, which would make Yancey liable, even if the Wife was not only a mere licensee but even if she had actually been a trespasser.

THE WIFE WAS ENGAGED IN SOMETHING FOR THE BENEFIT OF YANCEY WHEN SHE ENTERED THE PREMISES OF YANCEY, AND EVEN UNDER SUCH CIRCUMSTANCES, WITHOUT THE EXPRESS INVITATION OF THE HUSBAND, SHE BECAME AN INVITEE BY IMPLICATION.

Smith v. Pickwick Stages System, supra, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson,* supra;

Buckingham v. San Joaquin Cotton Oil Co., 16 Pac. (2d) 807;

Childers v. Southern Pac. Co., 149 Pac. 307.

In connection with the foregoing subjects, we have cited a portion of the opinion from *Smith v. Pickwick Stages System,* supra, and referred to this last principle of law. From the facts alleged in the complaint, there can be no question, it would seem, that the Wife entered the premises of Yancey for the purpose of doing something for the benefit of Yancey, to-wit, facilitate the trip which his servant and employee was to take in calling upon a prospective customer of Yancey.

YANCEY IS BOUND BY THE ACT OF THE HUSBAND AS HIS AGENT, THAT ACT FALLING WITHIN THE APPARENT SCOPE OF THE AUTHORITY OF THE AGENT. YANCEY WILL NOT BE PERMITTED TO DENY SUCH AUTHORITY AGAINST THE WIFE, AN INNOCENT THIRD PARTY WHO DEALT WITH THE AGENT IN GOOD FAITH.

Smith v. Pickwick Stages System, supra, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson,* supra;

Skerl v. Willow Creek Coal Co., 69 Pac. (2d) 502;

Harrison v. Auto Securities Co., 257 Pac. 677;

Healy v. Johnson, 103 N. W. 92;

Ada-Konawa Bridge Co. v. Cargo, 21 Pac. (2d) 1.

In the case of *Skerl v. Willow Creek Coal Co.* (Utah, 1937), supra, at page 506 of 69 Pac. (2d), the Court said:

> "It is a general principle of the law of agency, running through all contracts made by agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent scope of the authorities of the agents, and that the principals will not be permitted to deny the authority of their agents against innocent third parties, who have dealt with those agents in good faith. That general principle of agency is universally recognized and applied by the courts, and is laid down by every text-writer who has written upon the subject of agency."

To the same effect see

Harrison v. Auto Securities Co., 257 Pac. 677.

In the *Skerl* case, supra, the Court was considering the authority of an agent to invite third persons on the master's premises and held that where there was an apparent authority, the master could not be heard to deny the agent's authority to extend the invitation.

Surely in the instant case the Wife had a right to depend upon the apparent authority of the Husband, who entered the premises for business purposes, had a key by which he entered, and was engaged in the master's business.

Later in the *Skerl* case, at page 507, the Court considered what constituted apparent authority in a servant, and said:

"Apparent authority must be 'apparent'; that is, the act in question which is done by the agent must be such as one which would seems to be within the purview of his actual authority. . . . In other words, the work which the agent is really authorized to do must be such that the act which he does and in regard to which his authority is in question is usual or incidental or of the same nature or reasonably connected with that work or authority which he actually has or he cannot be apparently authorized. Otherwise, the fact that one dealing with another whom he knew was an agent would give that agent apparent authority to do everything an agent might do.

"I doubt whether Jackson, who had charge of entering and removing the coal, had apparent authority to invite people up to the mine while off the premises. When they were on the premises and asked whether they could go in, he, being in charge of inside operations and they knowing that and their request being to go inside, might assume that he had the authority to permit them to enter. Such permission at such time was within his apparent authority. But his previous invitation was material at least to show the occasion for their coming and to show that they knew what Jackson's job consisted of so that they might presume his authority to admit them. Had they, however, on their own initiative arrived and made inquiries and Howard and Jackson said what they did, and it being shown that they knew what positions those men occupied or the circumstances were such that they could reasonably presume that they had authority to admit them, I think the jury would have been justified in coming to the conclusion that they were permitted to enter the mine."

In the case of

Healy v. Johnson, 103 N. W. 92,

the Supreme Court of Iowa says:

> ". . . The doctrine of respondeat superior is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions."

In the case of

Childers v. Southern Pac. Co., 149 Pac. 307,

the Court was considering the question as to whether or not an employee was acting within the scope of employment or in pursuance of his own ends, and at page 308, quoting from *Mechem on Agency,* page 1960, said:

> "But in general terms it may be said that an act is within the 'course of employment' if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or illadvisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account."

In the case of

Ada-Konawa Bridge Co. v. Cargo, 21 Pac. (2d) 1,

at page 7, Note 7, the Court said:

> "The presumption exists that, when the servant is in performance of his master's business, he is acting within the scope of his employment. See Doherty v. Lord, 8 Misc. 227, 28 N. Y. S. 720."

The Court also cites with approval the case of *Childers v. Southern Pac. Co.,* supra.

It would seem that under the facts as alleged in the complaint, there can be no question of the implied authority of the Husband to invite the Wife into the premises, and that the Wife rightfully relied upon that authority, and became an invitee.

THE DOCTRINE OF RESPONDEAT SUPERIOR IS NOT LIMITED TO THE ACTS OF THE SERVANT DONE WITH THE EXPRESS OR IMPLIED AUTHORITY OF THE MASTER, BUT EXTENDS TO ALL ACTS OF THE SERVANT DONE IN DISCHARGE OF THE BUSINESS INTRUSTED TO HIM, EVEN THOUGH DONE IN VIOLATION OF HIS INSTRUCTIONS.

Healy v. Johnson, 103 N. W. 92;
Childers v. Southern Pac. Co., 149 Pac. 307.

In *Childers v. Southern Pac. Co.,* supra, the Court, in considering the question as to whether or not an invitation could be implied because of the mutual interest of the master and the injured plaintiff, quoted at page 308 from *Mechem on Agency,* page 1960, as follows:

> "But in general terms it may be said that an act is within the 'course of employment' if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant

was engaged upon the master's business and be done, although mistakenly or illadvisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account."

APPELLANTS ARE ENTITLED TO THE PRESUMPTION THAT EXISTS THAT WHEN THE SERVANT IS ENGAGED UPON THE PERFORMANCE OF HIS MASTER'S BUSINESS HE IS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT. THE SUPREME COURT OF NEVADA HAS ENUNCIATED SUCH RULE.

In *Crosman v. Southern Pac. Co.,* 194 Pac. (Nev. 1921) 839, the Court reiterates a rule of the Nevada Supreme Court by a citation from a former decision of that Court in this language:

> " 'In considering the granting or refusing of a motion for a nonsuit the court must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, and every inference of fact that can be legitimately drawn therefrom, and give the plaintiff the benefit of all legal presumptions arising from the evidence, and interpret the evidence most strongly against the defendant.' Burch v. Southern Pacific Co., 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166."

It is of course fundamental that the presumption exists that when a servant is engaged upon the performance of his master's business he is acting within the scope of his employment.

In the instant case the Appellants are entitled to that presumpton in their favor, and if such presumption is indulged in, then the Wife was on the premises of Yancey as an express invitee, Yancey owed her the duty of ordinary care, and there can be no question that that duty was not performed.

THE NEVADA SUPREME COURT HAS DETERMINED AS THE LAW OF NEVADA THAT THE HUSBAND'S CONTRIBUTORY NEGLIGENCE CANNOT BE IMPUTED TO THE WIFE SO AS TO PRECLUDE RECOVERY BY THE WIFE FROM A THIRD PERSON, YANCEY, NOTWITHSTANDING STATUTES PROVIDING THAT ALL PROPERTY ACQUIRED AFTER MARRIAGE IS COMMUNITY PROPERTY.

Fredrickson & Watson Co. et al. v. Boyd et al., 102 Pac. (2d) 627.

Having in mind that the law to be applied in any case is the law of the state as declared by its highest Court, it is submitted that the District Court should have applied, and probably did apply, this rule of law. It is referred to simply for the purpose of excluding any possibility that the District Court could have based its decision upon a finding of the contributory negligence of the Husband as a matter of law, which in some of the community property states might bar the Wife from recovering, but which is not the case in Nevada.

It should also be pointed out, in further excluding any possibility of that character, that in *Crosman v. Southern Pac. Co.* (Nev.), supra, the Court held that:

> "Contributory negligence is no defense to an action for damages for an injury willfully or wantonly inflicted. (Citing textbooks and cases.)"

As stated, this subject is referred to merely for the purpose of excluding the subject of contributory negligence as any basis for the decision of the District Court.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded, with instructions to require Yancey to plead to Appellants' complaint.

Dated, Reno, Nevada,
July 14, 1944.

Respectfully submitted,
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